(3)

No. 03-1322

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IN THE

Supreme Court of the United States

LOUIS J. PROVENZA,

Petitioner,

v.

LOUANNE FRIEND and WILBUR J. "BILL" BABIN, JR., as Trustee,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT TRUSTEE

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QUESTIONS PRESENTED FOR REVIEW

I. Whether real property of a non-bankrupt ex-spouse constitutes property of a bankruptcy estate under 11 U.S.C. § 541 where there has been no state partition at the time of the filing of the bankruptcy petition, and the property is jointly titled in a non-community state, but there exists community debt and the property would be considered community if situated in the community state.

Petitioner's second and third "questions presented for review" are argumentative and misstate what occurred below. Properly formulated, the Petitioner's second and third questions presented for review are:

II. Whether the District Court, sitting as the appellate tribunal of the Bankruptcy Court, erred by amending its original Judgment entered on December 12, 2002, with its Amended Judgment entered on January 15, 2003, pursuant to motions filed within ten days of the original Judgment.

III. Whether it was error for the Court of Appeals for the Fifth Circuit to affirm the Judgment of the District Court without addressing the question of whether it was error for the District Court to enter its Amended Judgment.

LIST OF ALL PARTIES TO THE PROCEEDING

The Petitioner omitted from the caption one of the parties, namely Wilbur J. Babin, Jr., the Bankruptcy Trustee. In fact, the parties to this proceeding are as follows:

1. Louis J. Provenza (Petitioner), the Debtor in Case No. 00-11830, on the docket of the United States Bankruptcy Court for the Eastern District of Louisiana, originally filed as a voluntary Chapter 11 proceeding, and converted on the Debtor's Motion to Convert to Chapter 7 on October 24, 2001.

2. Wilbur J. Babin, Jr. (Respondent Trustee), the duly appointed Chapter 7 Trustee in the bankruptcy case. The Trustee participated in both the contested matter heard in the Bankruptcy Court, as well as the appeal to the District Court. He did not file a brief in the appeal to the Fifth Circuit.

3. Louanne Friend (Respondent Friend), the Debtor's former spouse, not in bankruptcy.

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ADDITIONAL RELEVANT STATUTORY AUTHORITY

11 U.S.C. § 363(h) states:

> (h) Notwithstanding subsection (f) of this section, the trustee may sell both the state's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if -
>
> (1) partition in kind of such property among the estate and such co-owners is impracticable;
>
> (2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;
>
> (3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and
>
> (4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

11 U.S.C. § 363(j) states:

> (j) After a sale of property to which subsection (g) or (h) of this section applies, the trustee shall distribute to the debtor's spouse or the co-owners of such property, as the case may be, and to the estate, the proceeds of such sale, less the costs and expenses, not including any compensation of the trustee, of such sale, according to the interests of such spouse or co-owners, and of the estate.

Rule 8015 of the Federal Rules of Bankruptcy Procedure states:

> **Rule 8015. Motion for Rehearing.** Unless the district court or the bankruptcy appellate panel by local rule or by court order otherwise provides, a motion for rehearing may be filed within 10 days after entry of the judgment of the district court or the bankruptcy appellate panel. If a timely motion for rehearing is filed, the time for appeal to the court of appeals for all parties shall run from the entry of the order denying rehearing or the entry of a subsequent judgment.

STATEMENT OF THE CASE

Respondent will not restate the underlying facts but will correct a misstatement made by Petitioner. In his Statement of the Case, Petitioner mistakenly asserts that the District Court "found that because the co-owned properties were located in non-community states, they were not part of the bankruptcy estate." Petition for a Writ of Certiorari at 4. In fact, the District Court found that because both of the spouses' names were on the titles to those out of state properties, Louisiana Civil Code Article 3525 was not

applicable, and rather, Louisiana Civil Code Article 3535 governed, and, accordingly, these out of state properties were not community property. As such, the District Court ruled (and the Fifth Circuit affirmed) that the Debtor's (the Petitioner's) undivided one-half interest in those properties *was* property of the bankruptcy estate, but that the Respondent Friend's one-half undivided interest in those properties was not property of the estate.

REASONS FOR DENYING THE PETITION

I. This Case Implicates No Split in Authority among the Circuits.

This case arises out of a bankruptcy in the Eastern District of Louisiana. Most of the property owned by the bankruptcy estate was in the State of Louisiana, a community property state. *See In Re Robertson*, 203 F.3d 855, 859 (5th Cir. 2000) *citing* La. Civ. Code Ann. arts. 2327-2329. However, among the bankruptcy estate's assets were two parcels in Florida and one in Mississippi, which were jointly titled to Petitioner and Respondent Friend. Neither Florida nor Mississippi are community property states.

With the filing of the bankruptcy, the property of the bankruptcy estate is comprised of properties listed in Section 541(a) of the Bankruptcy Code. 11 U.S.C. § 541. This property includes "all legal or equitable interest of the debtor in property as of the commencement of the case" pursuant to 541(a)(1), as well as the interest of the debtor and the debtor's spouse in the community property as of the commencement of the case. 11 U.S.C. §§ 541(a)(1) & (2). Congress left the creation and definition of the property interests of a debtor's bankruptcy estate to state law. *In Re Robertson*, 203 F.3d 855, 859 (5th Cir. 2000),

citing Butner v. United States, 440 U.S. 48, 54, 99 S. Ct. 914, 918, 59 L. Ed. 2d 136. As the Supreme Court in *Butner* further stated, "[p]roperty interests are created and defined by state law." 440 U.S. at 55, 99 S. Ct. at 918.

A. Louisiana Choice of Law Analysis Results in the Application of Situs Law

Obeying *Butner*, each of the three Courts below, the Fifth Circuit, the District Court, and the Bankruptcy Court, analyzed the relationship of two Louisiana Civil Code conflicts of law articles, comparing Louisiana Civil Code art. 3535 (regarding immovables located in another state) with La. Civ. Code art. 3525 (regarding community property acquired in another state by only one spouse with community funds). The Fifth Circuit and the District Court correctly determined that under both the explicit language of these articles, as well as under the policy reasons behind them, Florida and Mississippi law controls the property, not Louisiana community property laws.

1. Under the language of La. Civ. Code art. 3525, Florida and Mississippi law controls the Property

Unlike a situation in which only one spouse acquires out of state property, the properties at issue were titled in both spouses' names. The possible application of La. Civ. Code art. 3525 turns upon whether it applies when the out-of-state property is titled in both names. In parsing La. Civ. Code art. 3525, the United States Fifth Circuit correctly analyzed La. Civ. Code art. 3525 as follows:

> The ordinary meaning of the word "either" is that it denotes one of two possible options. It is not commonly understood as including the selection

> of both possible options. Aside from the plain meaning, the rest of the Louisiana Civil Code suggests that the drafters clearly understood there to be a difference between the term "either" and "both" with "either" being exclusive of both. For example, in Article 142, the Code states ". . . [t]he court may order *either* or *both* of the parents to provide an interim allowance or final support for a child . . ." *See* La. Civ. Code Ann. art. 142 (emphasis added). Furthermore, there are instances in the Code of using the term "both" without also using "either" which suggests the drafters could have used the term "both" in Article 3525 but chose not to.

In re Provenza, Case No. 00-11830, *Friend v. Provenza*, No. 02-31256 (5th Cir. 11/4/2003) (per curiam) - 1A of Appendix to Petitioner's Writ of Certiorari. ("United States Fifth Circuit Opinion.")

2. The Fifth Circuit and District Courts Correctly Analyzed the Policy Reasons behind Louisiana Conflicts of Law Rules to Determine that Florida and Mississippi law Controls the Properties

The Fifth Circuit analyzed the comments to La. Civ. Code art. 3525 in its analysis of the competing interest of the states. It interpreted the comments correctly to mean that Louisiana was interested in protecting a spouse from a spouse who buys property in another state *in only one of their names* using community funds. The Fifth Circuit correctly held that based on the official Revision Comments, the intent of the legislature was to protect the spouse, not community creditors. As the District Court stated:

> Moreover, common sense dictates that Article 3525 should not be expanded to cases of joint acquisition. The law was intended to protect non-

> owner spouses from being unknowingly or fraudulently subjected to foreign property laws . . . It is highly improbable that Louisiana is similarly interested in protection of spouses who jointly participate in the acquisition of the foreign immovables.

In re Louis J. Provenza, et al., Case No. 00-11830, No. 02-3045 (E.D. La. 12/12/2002), 1-C of Appendix to Petitioner's Writ of Certiorari. ("District Court Opinion.") The Fifth Circuit held that

> Louisiana wishes to respect the interests of a state in governing its own property. While Louisiana might have some interest here, it recognizes that the interests of the state where the property is located are greater.

United States Fifth Circuit Opinion. This is the non-astounding, basic conflict of laws principle that the law of the state of situs governs real property. The Fifth Circuit and the District Court correctly determined that Florida and Mississippi's interests are greater than Louisiana's interest.

B. Under Florida and Mississippi State Law, Each Respondent (Trustee and Friend) owns a one-half interest in the non-Louisiana Parcels

Under the laws of Florida and Mississippi, Respondent Trustee and Respondent Friend each owned an undivided one-half (1/2) interest in the non-Louisiana parcels. Petitioner/Debtor attempts to blur this point by vaguely referring to "tenancy properties" when citing *Geoghegan*[1] and *McRae*[2]. These two cases concern instances where

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1. *In Re Geoghegan*, 101 B.R. 300, 329 (Bankr. M.D. Fla. 1989) at writ app. p. 18.

2. *In Re McRae*, 282 B.R. 704, 709 (Bankr. M.D. Fla. 202).

"tenancies in the entirety" existed. However, as the District Court explained, under Florida law, the tenancies by the entirety were transformed into tenancies in common upon the marriage's dissolution. District Court Opinion, *citing* Florida Statute Annotated Section 689.15. Similarly, the District Court analyzed the warranty deed for the Mississippi property, noting that Provenza and Friend held title as "'tenants with the full rights of survivorship in tenancy in common.'" The *Geoghegan* and *McRae* cases only concern tenancies by the entirety.

C. The Petitioner Inaccurately Analyzes the Various Circuit Courts' Opinions Cited

The failure to address the fact that, in the instant case, title to the Florida and Mississippi properties does not concern "tenants by the entirety," is the first reason why there is no split in the circuits to address in this case. Each of the old pre-Bankruptcy Code cases cited by Petitioner/Debtor in connection with the purported conflict[3] concerns, in Petitioner/Debtor's own words, "property held by a debtor as a tenant by the entirety." Petition for Writ of Certiorari at 10.

A second failing of Petitioner/Debtor's purported conflict among the Circuits is with reference to the Ninth Circuit's *In Re Mantle*.[4] Petitioner/Debtor states:

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3. *Dioguardi v. Curran*, 35 F.2d 431 (4th Cir. 1929); *Collon v. Kearns* (*In Re Kearns*), 8 F.2d 437 (4th Cir. 1925), *cert. denied*, 269 U.S. 587, 46 S. Ct. 203, 70 L. Ed. 426 (1926); *Fetter v. United States*, 469 F.2d 467 (6th Cir. 1959); *In Re Berry*, 247 F.2d 700 (E.D. Mich. 1917); collectively the "Old Cases").

4. Petition for Writ of Certiorari at 10, citing *In Re Mantle*, 153 F.3d 1082 (9th Cir. 1998).

> The Ninth Circuit has expressly found that "all community property not yet divided by a state court at the time of bankruptcy filing is property of the bankruptcy estate."

Petition for Writ of Certiorari at 10, citing *In Re Mantle*, 153 F.3d 1082 (9th Cir. 1998) (further citations omitted). However, the out of state property was not "community property." More importantly, the Fifth Circuit agrees entirely with the Ninth Circuit on this issue. *In re Robertson*, 203 F.3d 855, 861 (5th Cir. 1998). Petitioner's complaint is with the result, not with the principle of law.

Third, Petitioner's analysis of the Tenth Circuit's opinion in *Fingado v. Swink*, 995 F.2d 175 (10th Cir. 1993), likewise fails in its attempt to create a conflict among the Circuits. *Fingado* concerns community property located in New Mexico, a community property state. *Id. Fingado* is a straightforward 11 U.S.C. § 541(a)(2) case, interpreting New Mexico law regarding New Mexico real estate, and is in harmony with the Fifth Circuit and Ninth Circuit jurisprudence.

Fourth and finally, in Petitioner's attempt to create a conflict among the Circuits regarding 11 U.S.C § 541, Petitioner/Debtor looks to 11 U.S.C. § 363(h) jurisprudence. Section 363(h) of the Bankruptcy Code concerns the ability of the Trustee to sell co-owned property, not who has title to property, and not what constitutes property of the estate. Section 541 of the Bankruptcy Code determines what constitutes property of the estate. *Compare* 11 U.S.C. § 363(h) *with* 11 U.S.C. § 541. A Trustee has the authority to sell co-owned property pursuant to 11 U.S.C. § 363(h), free and clear of the interest of co-owners. Indeed, that is exactly

what happened in the instant case. The funds were held by the Trustee in escrow pending resolution of ownership issues.[5] The District Court and the Fifth Circuit properly analyzed what constitutes property of the estate under 11 U.S.C. § 541, the applicable Bankruptcy Code provision.

II. & III. Neither the District Court nor the Court of Appeals for the Fifth Circuit "departed from the accepted and usual course of judicial proceedings . . . so as to call for an exercise of this Court's supervisory power."

The District Court had a typographical error in its "Order and Reasons." The typographical error read:

> Because the co-owned immovables in Florida and Mississippi are not characterized as community property, they are not part of the Provenza bankruptcy estate.
>
> Accordingly, the judgment of the bankruptcy court is reversed.

District Court Opinion. The entirety of the Order and Reasons of the District Court (as well as the Bankruptcy Court) concerns whether or not Ms. Friend's one-half (1/2) interest in the properties was part of the bankruptcy estate after the application of state law to determine the property interest under 11 U.S.C. § 541. There was never any assertion by Debtor, nor was there analysis in either the Bankruptcy or the District Court opinion that the Debtor's one-half (1/2)

5. The Trustee disbursed Respondent Friend's funds to her after the Fifth Circuit denied Petitioner's motion for rehearing and issued its Mandate. No stay was obtained.

interest in the Mississippi and Florida properties were not property of the estate. Accordingly, the District Court issued an Amended Judgment making clear that the Debtor's one-half (1/2) interests in the Florida and Mississippi properties were in the Bankruptcy estate, while Ms. Friend's interests were not.

In rendering its opinion, the District Court sat in its capacity as the first level of appeal for Bankruptcy Court appellate jurisdiction. 28 U.S.C. § 158(a). Petitioner admits that the District Court was exercising its appellate jurisdiction. Petition for Writ of Certiorari at 7. The procedural rules governing bankruptcy appeals are set forth in Part VIII of the Bankruptcy Rules. *See* Bankruptcy Rule 8001, *et seq*. The specific rule regarding a motion for rehearing by a District Court sitting in its appellate capacity is Bankruptcy Rule 8015, which states:

> Unless the District Court or the Bankruptcy appellate panel by local rule or by court order otherwise provides, a motion for rehearing may be filed within 10 days after entry of the judgment of the district court or the bankruptcy appellate panel. If a timely motion for rehearing is filed, the time for appeal to the court of appeals for all parties shall run from the entry of the order denying rehearing or the entry of a subsequent judgment.

Bankruptcy Rule 8015. Even where a motion to the District Court is denominated as a Federal Rule of Civil Procedure 60(a) motion, the motion must be treated as a Bankruptcy Rule 8015 motion. *See e.g.*, *English Speaking Union v.*

Johnson, 353 F.3d 1013, 1018 (D.C.C. 2004); *In Re Brenner*, 1991 W.L. 239942, *2 (E.D. Pa.). As the Court in *English Speaking Union* explained:

> . . . the Fifth Circuit has squarely held that Bankruptcy Rule 8015 offers litigants the only means for challenging district court bankruptcy appellate orders. *See Butler v. Merchants Bank & Trust Co.*, 2 F.3d 154, 155 (5th Cir. 1993) ("when the District Court is acting an appellate court in a bankruptcy case Bankruptcy Rule 8015 provides the sole mechanism for filing a motion of rehearing.'" (quoting *In Re Eichelberger*, 943 F.2d 536, 538 (5th Cir. 1991))).

English Speaking Union v. Johnson, 353 F.3d 1013, 1019 (D.C.C. 2004). Accordingly, the second and third issues raised by the Petitioner regarding F.R.C.P. 60(a) simply are not issues in this case as a matter of law.

The District Court did not err in amending its judgment. Bankruptcy Rule 8015 is silent as to the appropriate standard for granting relief. *Hessco Industries, Inc.*, 295 B.R. 372, 375 (B.A.P. 9th Cir. 2003). However, most authority looks to F.R.A.P. 40 for guidance, as that is the rule from which Bankruptcy Rule 8015 was derived. *Id.*, *citing Olson v. United States*, 162 B.R. 831, 834, (D. Neb. 1993); *see also* 9 Collier on Bankruptcy paragraph 8015.04 at 8015-4 (15th Ed. 1993). The authority of an Appellate Court under F.R.A.P. 40 includes the authority to "issue other appropriate order." F.R.A.P. 40(a)(4)(C). The District Court acted appropriately in correcting the typographical error in order to avoid

removing the one-half interest of the bankruptcy estate in the Florida and Mississippi properties from the bankruptcy estate.[6]

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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6. In raising the F.R.C.P. 60(a) issues, Petitioner may be attempting to set up a "straw man" to knock down. If there were no Amended Judgment of the District Court, but only the first District Court judgment, the District Court would obviously be incorrect and need to be overturned. The Trustee is filing this writ opposition to ensure that the estate does not lose its one-half interest in the Florida and Mississippi properties.